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The Constitutional Uncertainty of EU Law

Niamh Nic Shuibhne*

Review Article of

Miguel Poiares Maduro and Loïc Azoulay (eds.)

The Past and Future of EU Law

The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty

Hart Publishing, 2010

1. *The Past and Future of EU Law: Premise and Methodology*

More than 50 years into the EU integration project, some of the systemic questions we cannot properly answer are improbably fundamental to the whole enterprise. This is certainly true if we probe its legal foundations. In *The Past and Future of EU Law*, Miguel Maduro and Loïc Azoulay bring together a remarkable range of contributors to do just that, selecting 12 clusters of ‘classic’ Court of Justice case law as reflective hooks.¹

The objectives of the collection and the methodology applied are clearly explained in the editors’ *Introduction*, the key points of which can be highlighted briefly here. Looking across the judgments chosen, three overlapping categories of case law are identified (*Introduction*, xv-xvi): (1) cases that ‘establish and guarantee the authority of the Community legal order’; (2) those that ‘legitimise the authority of the Community legal order’; and (3) cases ‘defining the borders of

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¹ The cases are: (1) direct effect: Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; (2) primacy: Case 6/64 *Costa v ENEL* [1964] ECR 585 and Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629; (3) protection of EU fundamental rights: Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 and Case 4/73 *Nold v Commission* [1974] ECR 491; (4) protection of EU fundamental rights by Member States: Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis* [1991] ECR I-2925 and Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609; (5) principles governing the preliminary reference procedure: Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministero della Sanità* [1982] ECR 3415 and Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199; (6) external relations: Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263, Case C-466/98 *Commission v UK* [2002] ECR I-9427, C-467/98 *Commission v Denmark* [2002] ECR I-9519 et al (*Open Skies*), and Opinion 2/94, [1996] ECR I-1759; (7) equal pay: Case 43/75 *Defrenne v SABENA (Defrenne II)* [1976] ECR 455; (8) constitutional discourse and judicial protection: Case 294/83 *Parti écologiste ‘Les Verts’ v European Parliament* [1986] ECR 1339; (9) EU citizenship: Case C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691 and Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; (10) state liability: Joined Cases C-6/90 and C-9/10 *Francovich and Bonifaci v Italy* [1991] ECR I-5357; (11) free movement of goods: Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837 and Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649; and (12) EU sports law: Case C-415/93 *Union Royal Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921.

Community law'. In order to qualify as 'classic' case law, a judgment must not have been delivered too recently, to facilitate the application of critical distance; but it must also have 'survived the passing of time' (*Introduction*, xiii). Its impact should still be felt as a legal precedent as the specific puzzle it addressed continues to evolve, but more broadly too, in three senses: first, its impact should also have rippled across other questions of EU law; second, it should contribute something to the constitutive fabric of the EU legal order, offering, in other words, a 'broader normative lesson' (*Introduction*, xiii); and third, there should be evidence of broader engagement with the judgment among the legal, academic and social communities within which the Court of Justice operates.

There are four commentators on each case law cluster, drawn from four specific analytical communities: past or present members of the Court itself, established EU legal scholars; 'new generation' (*Introduction*, xiv) legal scholars; and 'the view from outside' (*Introduction*, xiv) i.e. scholars either from another legal or social discipline or from other legal orders. Each essay stands alone in the sense that contributors were invited to comment on each case/cluster in an open-ended way, with no specific division of tasks or prescriptions about focusing exclusively on particular aspects of the case(s), although the downside of this is perhaps the repeated rehearsals of facts and judgment summaries in almost all four essays on each case. Commentators were, however, invited to consider a series of common questions which are detailed throughout the *Introduction*. For example, they were asked to situate each judgment, and its application, in its particular economic, political and social context; and, as well as reflecting on the impact of judgments in the past, to think prospectively about lessons that can continue to be learned in order that the EU might better face the challenges of the future. Finally, the editors invite the readers themselves to become the 'ideal interpreter' of the 'variety of viewpoints and different narratives on a set of cases that, in our view, embody the identity of the Community legal order and of the jurisprudence of the European Court of Justice' (*Introduction*, xv).

This article engages directly with that interpretative invitation. As a preliminary point, I should set out my own methodological approach. Primarily, the article is *reactive*. It works with both the cases selected and the perspectives highlighted as its source material, and reacts to the essays contributed on that premise rather than taking issue with the collection's parameters per se. In particular, the article does not, therefore, quibble with the inclusion of this or the exclusion of that case. It absorbs the criteria of selection and the criteria of evaluation designed by the editors. It takes a 'reverse jigsaw' approach, first breaking down the individual essays and

loosening the individual comments from the specific anchor of the case(s) on which they reflect, in order to draw out and then reconstruct the dominant themes and preoccupations that resonate *across* the volume. It tries to identify the questions consistently asked and to reflect on answers given – and not given. Above all, it asks whether there is collective, even if unintended, agreement on the contribution of case law to the evolution of EU law and on the contribution of EU law to the project of EU integration more generally. Re-reading classic case law is an interesting exercise. Most obviously, it reminds us what the judgments actually said. But it can also remind us that they do not always say what we think they said. We are all guilty of false or at least derived memory in this context, tending to read and rely on what other people say about the older judgments instead of repeatedly re-reading the judgments themselves. Especially in the essays contributed by past and present members of the Court, reading detailed reflections on the classics also reminds us of the very particular circumstances that were under consideration in each case, and we should remember this too when we attempt subsequently to decode and generalise case law messages. In the context of the volume itself, Nicolas Bernard rightly reminds us to be conscious of the limitations of explanatory narratives grounded in case law, since they may ‘invest judgments with a meaning and significance that they did not necessarily possess or were meant to possess, when they were first handed down’.² So the irony of wrapping an additional and unifying interpretative layer here around a series of unconnected *comments* on the case law is noted. And it is also clear that the themes and preoccupations picked up on by this reader present just one of many potential stories suggested by the richness of the material under review.

With this proviso in mind, it is presented here that the theme resonating most strongly both within and across the essays in this collection, intentionally or otherwise, is that of *constitutional uncertainty*. It will be shown that fundamental normative questions about the constitutional character of EU law remain contested. Whether this constitutional uncertainty has meaningful systemic impact in practice will be explored. Following a track of inquiry suggested by the essays themselves, the article then asks *why* the Court of Justice might have chosen to animate EU law in the way that it did (if we can ever know the answer to that question anyway). Finally, it concludes by reflecting on whether the constitutional course laid down by the Court is being continued, or needs to be corrected.

² N Bernard, ‘On the art of not mixing one’s drinks: *Dassonville* and *Cassis de Dijon* revisited’, 456 at 457.

2. EU Law and Constitutional Uncertainty

*All law is in part a fiction...but Union law may be even more of a fiction, more of an illusion, than other systems of law.*³

Few of the 48 contributors to *The Past and Future of EU Law* reflect on the nature of the EU as a polity. This means that statements about what the EU actually 'is' are relatively rare.⁴ This is not especially surprising, or problematic, given that the contributors were asked to engage with a body of established jurisprudence and to contemplate its effects over the markers of time, impact, and so on. In prefacing his legal analysis of *Francovich* with some polity-related thoughts, however, Julio Baquero Cruz goes on to raise a remarkably rich seam of questions on the nature of EU law itself. For him, EU law is 'imperfect'; it is 'uncertain and ambivalent':

Torn between the domestic, the federal and the international, it seems to be much more effective than most international law and yet less effective than most domestic and federal law. Its nature and authority...can never be taken for granted ... [T]he 'existence' of Union law depends on its constant acceptance by the legal systems of the Member States, the very 'existence' of which as closed and self-contained systems is constantly put into question by Union law itself. This tension is characteristic of federal systems in their initial, critical or final phases. In the Union, however, that tension seems to be consubstantial to the general practice of the system, and no durable equilibrium may be available. From a legal and also from a political point of view, the European Union seems to be condemned to be a crisis system, never attaining a lasting balance.⁵

So many conceptual leads emerge from this extract: the un-pin-down-able character of the EU and, thus, of EU law; the intrinsic connection between the EU and its Member States, and therefore also between their related legal orders; the contested and ephemeral qualities of EU legal authority; and the enduring elusiveness of resolution for the problem of systemic fragility that comes from this. The insightful portrait of EU law drawn by Baquero Cruz thus suggested above all, to me, the existence and persistence of constitutional uncertainty. While acknowledging the depth and nuance of possible meanings for the term, and the contested views

³ J Baquero Cruz, 'Francovich and imperfect law', 418 at 422.

⁴ Some instances include Fennelly's description of the EU as 'an international federal polity' (N Fennelly, 'The European Court of Justice and the doctrine of supremacy: *Van Gend en Loos*; *Costa v ENEL*; *Simmmenthal*', 39 at 46) and Nicolaïdis' explanation of the EU as a 'demoi-cracy' (K Nicolaïdis, 'Kir forever? The journey of a political scientist in the landscape of mutual recognition', 447 at 454).

⁵ Baquero Cruz, n. 3 above, at 418-419.

within the literature as to how or even whether it can apply within the EU legal order anyway, 'constitutional' is understood here in an essentially functional sense as a framing or foundational structure; for present purposes more specifically, as the EU's *law*-framing structure and, as such, as a relatively definitive and supposedly authoritative grounding for the impact and effect of substantive EU law. Yet one of the continuing paradoxes of EU law arises precisely from the deepness of its substance in contrast to the vulnerability of its roots. Another reason why a functional understanding of constitutionalism is also relevant here because, throughout the *Past and Future of EU Law*, there is much constitutional discussion but no real evidence of constitutional scepticism. If EU law *is* accepted as being grounded in a constitutional frame, then, ideally, that frame would be expected to provide the answers to questions about the authoritativeness of EU law and the durability of the EU legal order, generating in turn a stronger sense of systemic legal certainty than the concerns articulated by Baquero Cruz would suggest is in fact the case. Instead, the essays in *Past and Future* affirm the existence of the contradiction, in the sense that the substance of the law itself is recognised and engaged with as 'law', and while the constitutionalisation of EU law is not definitively worked out, neither is it expressly challenged. But there are several allusions to the ways in which uncertainty permeates EU constitutionalism: it is not clear how or why, or by whose hand, EU law acquired its constitutional status; its constitutional content is not quite settled either (as will be seen below, developments such as EU fundamental rights protection and the polity's grounding in the rule of law do flesh out constitutional content, but both past and future implications of that content are contested); and it is certainly not clear whether the EU legal order could be said to have a mutually accepted, definitive apex of constitutional authority. This sense of uncertainty is reflected most recently in the clumsy attempt made to salvage something from the express primacy clause included in the abandoned Constitutional Treaty.⁶ In its place, Declaration No 17 attached to the Lisbon Treaty states that '[t]he Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.' The Declaration also incorporates a 2007 Opinion from the Council Legal Service:

⁶ The Treaty establishing a Constitution for Europe, OJ 2003 C169/1, provided in Article I-6 that '[t]he Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.'

It results from the case law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law [*Costa*] there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case law of the Court of Justice.

So, primacy as established by the Court exists, and we accept that, but we can't really say so where it might count?

The Past and Future of EU Law lends itself particularly well to inducing constitutional reflection given that the Court of Justice was the dominant actor in the attribution of constitutionalism to the EU legal order. The volume thus sets the decision in *Van Gend en Loos* as its own fundamental starting point. The real breakthrough in that decision was not, as Franz Mayer reminds us, the finding of direct effect for extra-national norms per se, but that this finding was made by the Court and not established through the – express – intention of the Member States themselves.⁷ Bruno de Witte emphasises the astonishing passivity with which the decision was then met by the Member States, 'who [have] never tried collectively to overrule the Court' (even though the governments that intervened in the proceedings were against the eventual decision), but more than this, by the national courts too, who simply 'accepted that the ECJ could tell [them] which EC law norms had, or did not have, direct effect'.⁸ Daniel Halberstam reminds us of a fortuitous but potentially significant detail in this regard, that the preliminary reference came from a court in the Netherlands, 'which had already adopted monism as the guiding principle of its own legal system'.⁹

What is additionally important about both *Van Gend en Loos* and *Costa*, however, was the Court's appeal to 'the register of legal constitutionalism'.¹⁰ Evoking a constitutionalism of uncertainly, Mayer tellingly captures, through the Court's use of language in both cases, the 'peculiar twofold approach to European integration, where elements of public international law are still around while something distinct has already emerged', something that 'remains a

⁷ FC Mayer, '*Van Gend en Loos*: The foundation of a community of law', 16 at 20; see similarly, B de Witte, '*The continuous significance of Van Gend en Loos*', 9 at 10.

⁸ De Witte, *ibid.* at 13.

⁹ D Halberstam, '*Pluralism in Marbury and Van Gend*', 26 at 30.

¹⁰ N Walker, '*Opening or closure? The constitutional intimations of the ECJ*', 333 at 340.

hallmark of European integration until today'.¹¹ Why did the Court frame its reasoning in such loaded discourse? The key reason for doing so is not difficult to understand; using Neil Walker's words, 'in the complex, part-competitive and part-cooperative play of plural but interlocking orders, the invocation of the status-conferring, polity-implicating language of constitutionalism can amplify and help bolster the claims to integrity and autonomy made on behalf of the EU legal order.'¹² But where did this constitutional understanding of things come from? It is not clear at all from either *Van Gend en Loos* or *Costa* whether the Court spoke of sovereignty transfer because this is what the Member States did; or whether the Member States are considered to have done this because the Court decided to say so.¹³ Ingolf Pernice tackles precisely these questions, perhaps concluding the involvement and interaction of a bit of both; but suggesting also, having sketched the core functions of constitutions in general and finding representation of these in the Treaties, that '[c]onceptualising the European Treaties as "constitutional", therefore, corresponds to their very nature and function'.¹⁴ In other words, does it matter so much 'who' called the Treaty 'constitutional' when its description as such bears up to objective scrutiny?

And yet, that a doctrine so powerful, in light of the theoretical and empirical richness from which it draws, and so densely state-oriented can rest on so ambiguous a footing remains one of the greatest mysteries – or at least uncertainties – of European Union law. It is EU science's own Big Bang moment: so much is now known, and accepted; yet what is *not* known or accepted, pertaining to the time and fact of the explosive moment itself, is fundamental to the truth of the whole hypothesis. It does seem a bit odd that so basic a gap can be identified yet proceeded from with a sigh or collective shrug, but it tends to be proceeded from nonetheless.

The exposition of fundamental rights as general principles of EU law marked a significant moment in the maturing of EU constitutionalism. We know that the motives here were inevitably mixed; the accepted narrative depicts the Court with one eye on tetchy national constitutional courts who had (valid) concerns about submitting national legal orders to the consequences of primacy in the absence of either direct recognition of national constitutional standards of rights protection or, as the Court eventually resolved it, an equivalent system of

¹¹ Mayer, n. 7 above, at 20; he uses the example of the 'Treaty establishing a Constitution for Europe' to demonstrate this.

¹² Walker, n. 10 above, at 338.

¹³ See similarly, Ingolf Pernice, '*Costa v ENEL* and *Simmenthal*: Primacy of European law', 47 at 52; he includes here the *people* of the Member States too, very much in keeping with the judgment in *Van Gend en Loos*.

¹⁴ Pernice, n. 13 above, at 54.

supranational protection instead.¹⁵ The contemporary uncertainty about the scope of Member State obligations to comply with EU fundamental rights standards – does this apply only when Member States are implementing EU law in a positive sense (e.g. transposing a directive) or must Member State derogation and justification arguments also comply with shared conceptions of those standards? – is raised in a number of chapters, but with no clear agreement on what the answer is, or ought to be.¹⁶ In *Les Verts*, the Court's proclamation (at para. 23 of the judgment) that the (then) Community was based on the rule of law further substantiated the constitutional foundations set down in *Van Gend en Loos* and *Costa*.¹⁷ Interestingly, authors considering EU external competences frame cases like *ERTA* in similarly constitutional terms, also noting the same concern with ensuring the uniformity and effectiveness of EU law in these judgments.¹⁸ Questions – and problems – provoked by more deliberate constitutional efforts will be picked up again in section 4 below.

A critical causal factor in the constitutional uncertainty of EU law is reflected by the particular emphasis on the role of national courts that emerges from almost all of the essays. These comments were especially resonant of another contested debate in contemporary EU scholarship, that on constitutional pluralism.¹⁹ In *Past and Future*, authors raise both the *ideal* and *practice* of constitutional pluralism in ways that suggest two sides of the same coin. On the one hand, several commentators emphasise, as outlined above, the *instrumental* way in which the Court of Justice engaged national courts in order to make real the idea of supranational constitutionalism. On the other side of the pluralism coin, however, we see the mixed response of the national courts themselves, biting the Court that fed them by assuming the obligations of

¹⁵ See e.g. M Kumm, *Internationale Handelsgesellschaft, Nold and the new human rights paradigm*, 106 at 114.

¹⁶ See e.g. FG Jacobs, *Wachauf and the protection of fundamental rights in EC law*, 133 at 137-138; P Cruz Villalón, *“All the guidance”: ERT and Wachauf*, 162 at 169. There is a persisting disconnect between the Lisbon Treaty text and the explanatory notes discussing that text on this point; see further, N Nic Shuibhne, *Margins of appreciation: National values, fundamental rights and EC free movement law*, (2009) 34:2 *ELRev* 230, at 241-243.

¹⁷ Koen Lenaerts charts the complexity and evolution of the inter-linked ‘complete system of judicial protection’ in the EU also flagged in *Les Verts* (K Lenaerts, *The basic constitutional charter of a community based on the rule of law*, 295 at 303-4 especially).

¹⁸ See e.g. P Eeckhout, *Bold constitutionalism and beyond*, 218, who traces the Court's ‘strong constitutionalist approach’ (218) in his discussion of *ERTA*. More generally, Christophe Hillion argues that the decision in *ERTA* ‘catalyses the on-going emergence of the Community as law-making actor on the global stage’ (C Hillion, *ERTA, ECHR and Open Skies: Laying the grounds of the EU system of external relations*, 224 at 225).

¹⁹ For detailed overview and discussion of contemporary scholarship on constitutional pluralism, see N Walker, *Constitutionalism and Pluralism in Global Context*, in M Avbelj and J Komarek (eds.) *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, forthcoming, 2010).

their empowerment through the *Simmenthal* doctrine but drawing a line at the point of subjugation of their exclusive national constitutional mandate. Thinking about the instrumental aspect, and the contribution made by national courts as (willing?) agents of the Court of Justice, Donald Regan observes that ‘the contribution of European law is to identify cases in which the national courts must undertake serious review, *whether or not they would do so under national law*, and with the Community watching.’²⁰ In this task, the instrumental engagement of national courts²¹ aligns historically with the typical descriptor of *co-operation* – a dynamic filled out by Alec Stone Sweet in speaking of ‘persuasion, mutual empowerment, and inter-court dialogue’.²² Nial Fennelly acknowledges the unlikely success of this process of co-operative engagement, and the national courts’ own role in fulfilling it, by pointing out that the Treaty in fact ‘says nothing about the *obligations* of the courts of the Member States, whether or not they have referred questions to the Court of Justice’.²³ Also engaging with mutually empowering expressions of co-operation, Hofmann envisages the EU as a plural legal order in which ‘precedence is given to co-operatively created law over unilateral acts of the Member States’.²⁴ All of this comes close to perceiving constitutional pluralism within the frame of an ideal process of judicial engagement: a mutually respectful, consultative process where instrumental benefits cut both ways.

But Alec Stone Sweet then goes further, introducing the intrinsic tension in all of this by portraying an essentially vertical relationship, given the Court of Justice’s leading role in at least articulating the conditions for mutual engagement, but pointing out, nonetheless, that this is ‘a governance situation in which the organ empowered to make (or give content to) the law has no direct, jurisdictional means of obtaining obedience from a second organ, whose exercise of authority is necessary to render the law made by the first organ effective.’²⁵ Moreover, Mayer argues that the preliminary reference procedure ‘radically disaggregates the state’ since the national courts ‘owe the Community a duty of obedience that is not mediated by the national political branches, national laws, or even the national constitution’.²⁶ These are precisely some of the points of constitutional uncertainty that could have been clarified through an express Treaty

²⁰ DH Regan, ‘An outsider’s view of *Dassonville* and *Cassis de Dijon*: On interpretation and policy’, 465 at 470 (emphasis added).

²¹ Discussed in these terms by A Biondi, ‘In praise of *Francovich*’, 413.

²² A Stone Sweet, ‘The juridical *Coup d’État* and the problem of authority: *CILFIT* and *Foto-Frost*’, 201 at 201.

²³ Fennelly, n. 4 above, at 45 (emphasis added).

²⁴ HCH Hofmann, ‘Conflicts and integration: Revisiting *Costa v ENEL* and *Simmenthal II*’, 60 at 62.

²⁵ Stone Sweet, n. 22 above, at 203.

²⁶ Mayer, n. 7 above, at 29.

primacy clause: in substantive terms, by making a Treaty-anchored statement on primacy, and in representational terms, by its acceptance through national ratification processes. That may not be very sympathetic to the ideal of pluralism, but it does bring constitutional certainty. We also know, however, that it did not happen. Given the mixed understandings of pluralism in practice, then, can EU constitutionalism be made at least *more* certain?

Zdeněk Kühn highlights an additional complication when he notes that '[t]he logic of European integration empowered the national *ordinary* courts and disempowered national *constitutional* courts'.²⁷ This insight has been a critical catalyst, fuelling the Court of Justice/national constitutional court push-pull tension. Tridimas suggests that the express reference to the constitutional traditions of the Member States as a formative source for EU fundamental rights standards in *Internationale Handelsgesellschaft* 'reconciled the primacy of Community law with respect for national constitutional traditions', which therefore provided 'ideological continuity'.²⁸ But we saw lingering constitutional uncertainty in the 'classic' era of debate over the proper locus of fundamental rights protection, evident still in the unsettled question about the continued legitimacy of the decision in *ERT*. Brun-Otto Bride argues that we also see it more recently in General Court and Court of Justice case law on the freezing of assets. He maintains that the evolution of more considered judgments, from a fundamental rights perspective, in Luxembourg is a reaction to the 'renewed concern of national constitutional courts' expressed through judgments dealing with the validity of the European Arrest Warrant and the ratification of the Lisbon Treaty itself.²⁹

These are just some examples of the practice if not the ideal of constitutional pluralism that are discussed in *Past and Future*. They emphasise especially that non-hierarchical constitutionalism has an inevitably fluid quality, which others would describe less positively as variable or unsettled. Halberstam depicts the 'mutual accommodation of pluralism' as a 'continuing process', leading us away from the sense that we can, or should, find a final or absolute point of resolution.³⁰ The practice of constitutional pluralism is, then, simply messy, but should be accepted as such. It is not characterised by mutual *submission* to a relatively fluid conception of legal hierarchy in constitutional matters, where the point of legal hierarchy may

²⁷ Z Kühn, 'Wachauf and ERT: On the road from the centralised to the decentralised system of judicial review', 151 at 161 (emphasis added).

²⁸ T Tridimas, 'Primacy, fundamental rights and the search for legitimacy', 98 at 99 and 98.

²⁹ B-O Bride, 'The ECJ's fundamental rights jurisprudence: A milestone in transnational constitutionalism', 119 at 126.

³⁰ Halberstam, n. 9 above, at 31.

shift according to circumstances but on a mutually worked out and agreed premise. Rather, it is a plurality of concurrent, mutually *exclusive* claims to hierarchy. The Court of Justice establishes and defends the primacy of EU law as an integral consequence of the way in which the EU was created; yet, at the same time, national constitutional courts retain and defend the national-constitutional and provisional features of primacy *recognition*. Tridimas catches this plainly, when he states simply that '[p]rimacy means different things to different courts'.³¹ Quite naturally in a contribution reviewing classic case law on EU protection of fundamental rights, since this represents an especially acute sphere of EU/Member State normative conflict, he goes on to show how and why the Court of Justice made its non-pluralist claim to constitutional authority: 'By setting itself at the apex of the judicial pyramid, the ECJ hijacked the constitutional agenda and set in motion a dialogue with the national constitutional courts from a position of relative strength'.³² At least one clear, and accepted, expression of hierarchy stems from the decision in *Foto-Frost*, in which the ECJ claimed exclusive power to determine the validity of EU acts. Tridimas points equally to the same non-pluralist attitude within national constitutional courts, since 'the overwhelming majority of them reserve to themselves residual jurisdiction to determine the outer limits of Community competence'.³³ And on it goes. Perhaps all we can expect from the practice of constitutional pluralism, then, is a tacit agreement to give practical effect to EU law on the basis of parallel constitutional understandings, until or unless national constitutional courts decide otherwise for their own reasons, when legitimated by the various national constitutions that they serve. Chalmers locates some justification for this position, reminding us that 'the central justification for their powers lies in their being prudent guardians of the ethical settlements underlying national political communities and national legal systems. A strong case has to be made why they should give up these duties of guardianship'.³⁴ Halberstam traces EU constitutional pluralism right back to *Van Gend en Loos*; and before that, he finds similar echoes in *Marbury v Madison*, in that '[b]oth decisions make important claims for central authority. And yet, in so doing, each inaugurates a regime of mutual accommodation among the competing actors lasting to this very day'.³⁵ This is, of course, something of a paradox and so it can only work in practice if genuine pluralism is actually working beneath the surface in contrast

³¹ Tridimas, n. 28 above, at 103.

³² *Ibid.* at 100.

³³ *Ibid.* at 101.

³⁴ D Chalmers, 'Looking back to ERT and its contribution to an EU fundamental rights agenda', 140 at 144-145.

³⁵ Halberstam, n. 9 above, at 36; *Marbury v Madison*, 5 US 1 Cranch 137 (1803).

to the public impression of irreconcilable claims to fictionally preserved, hierarchical constitutional autonomy with which we are all familiar. But the in-built risk is, of course, that this will only work *while* it works.

To bring some certainty, several authors comment that, in reality, the potential for conflict is rarely borne out in practice. Sometimes the Court of Justice gives a little;³⁶ and sometimes it really does not, yet even here, the absorption of the Court's decisions notwithstanding political and/or public narratives of disquiet is potentially astonishing. On this point, Chalmers expresses concern about what he terms 'widespread recalcitrance' among several national constitutional courts in the context of applying Court of Justice determinations on fundamental rights.³⁷ He sees this as evidence of 'little possibility of a European constitutional dialogue between national constitutional courts and little evidence of their weaving its case law into their deliberations.'³⁸ Interestingly, Craig cites a 2003 study demonstrating that *when* references are made, national courts display an extremely high (96.3%) compliance rate.³⁹ It would seem essential, then, to secure the infusion and mainstreaming of EU law and of its full potential in legal education across the Member States. Evoking the significance of awareness and acceptance as much as blunt information, Baquero Cruz argues persuasively that this has not yet happened 'due to the insufficient penetration of [EU] legal culture in the legal cultures of the Member States'.⁴⁰ He diagnoses the problem that '[m]any national legal actors and scholars still see the law of the European Union as something essentially foreign that does not concern them, that is not theirs.'⁴¹

³⁶ See e.g. Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

³⁷ Chalmers, n. 34 above, at 144.

³⁸ *Ibid.* See similarly, D Sarmiento, 'CILFIT and Foto-Frost: constructing and deconstructing judicial authority in Europe', 192 at 196.

³⁹ P Craig, 'The classics of EU law revisited: CILFIT and Foto-Frost', 185 at 187.

⁴⁰ Baquero Cruz, n. 3 above, at 420.

⁴¹ *Ibid.*

3. Why Did the Court Do What It Did?

*[T]he acquired knowledge seems so natural that one forgets the fights that gave birth to it.*⁴²

Baquero Cruz suggests that ‘the narrative of [the] development [of EU law] has been one of its *drift* from international into constitutional law’.⁴³ More typically, however, we tend to attribute a certain consciousness to the Court’s constitutional choices, whether we do this ourselves consciously or otherwise. For example, Walker characterises the Court’s crucial engagement with the language of the ‘new legal order’ in *Van Gend en Loos* as its ‘self-anchoring of the basic legal frame’, remarking, moreover, that ‘to suggest that this is an entirely innocent usage is to ignore the power of a certain type of narrative in the European constitutional debate’.⁴⁴ While Mayer, reflecting Bernard’s concern about the imposition of analytical narratives after the fact, contends that ‘the steps taken in *Van Gend en Loos* did not appear that dramatic to the judges in 1963’,⁴⁵ Morten Rasmussen makes the important point that the Court ‘tried to push the EC towards a federation...by the means of law’ in a truly unfavourable political climate, thinking of the historical shadow of the failed European Political Community and European Defence Community, and the ongoing strain caused by the Luxembourg Compromise.⁴⁶ Others are equally direct about the charge of a vision-equipped Court when commenting on later cases. Denys Simon, for example, describes *Defrenne* as ‘a paradigmatic case of the judicial strategy adopted by the Court of Justice in its flamboyant period.’⁴⁷ Robert Post intimates that, in *ERTA*, ‘the ECJ was driven by the goal of perfecting the European polity by theorising the circumstances in which the unity of external politics was necessary in order to safeguard the conduct of internal politics’.⁴⁸ Commenting on *Les Verts*, Jean-Paul Jacqué argues that ‘the pre-eminence of the rule of law thus empowers the Court to implicitly revise the Treaty *so that the Court can play its full role*.’⁴⁹

⁴² J-P Jacqué, ‘*Les Verts v European Parliament*’, 316 at 323.

⁴³ Baquero Cruz, n. 3 above, at 421 (emphasis added).

⁴⁴ Walker, n. 10 above, at 337 and 340.

⁴⁵ Mayer, n. 7 above, at 21.

⁴⁶ M Rasmussen, ‘From *Costa v ENEL* to the Treaties of Rome: A brief history of a legal revolution’, 69 at 69. Here, as in so many instances given the historical ‘half’ of the volume’s objectives, the arguments remind us of JHH Weiler, ‘The transformation of Europe’, *Yale Law Journal*, 100, 2403-2483.

⁴⁷ D Simon, ‘SABENA is dead, Gabrielle Defrenne’s case is still alive: The old lady’s testament...’, 265 at 269.

⁴⁸ R Post, ‘Constructing the European polity: *ERTA* and the *Open Skies* judgments’, 234 at 241. He goes so far as to say that, in *Open Skies*, ‘the ECJ uses the cover of Community legislation to perfect the European polity’ (247).

⁴⁹ Jacqué, n. 42 above, at 318 (emphasis added).

Also strikingly, Koen Lenaerts recalls the timing of *Les Verts*, just after the signing of the Single European Act (in which standing before the Court was *not* assigned to the European Parliament), and so ‘it fell to the Court of Justice to uphold the observance of equal judicial protection in the Community legal order notwithstanding the Member States’ lack of consensus on the matter.’⁵⁰

Surely those who might argue that the legal questions underpinning the importing of direct effect and primacy can be resolved on the more value- or motive-neutral premise of realising agreed contractual obligations must concede, then, that this language was not, in and of itself, a *necessary* feature of *Van Gend en Loos* or *Costa*. Pierre Pescatore confirms this instinct, with the bold statement that ‘the Court reacted...against the first manifestations of systemic opposition of the governments regarding the loyal execution of their obligations and against their ignorance of the judicial revolution brought about by the Community treaties in the banality of international law.’⁵¹ Walker goes so far as to argue that ‘for all its rhetorical charge, the constitutional symbolism has not made *any* apparent internal doctrinal different to the *acquis*’.⁵² So even if we cannot know *definitively* know what the values or motivations of ‘the Court’ actually were, we can nonetheless assume that deliberate, value-driven choice *were* made. We should not lose sight, however, of the very real *functional* questions facing the Court in these classic references either;⁵³ both ideology and pragmatic interests seem, therefore, quite intertwined.

Maduro and Azoulai frame these questions by contending that, first, ‘the Court defined both the extent and the nature of the normative authority of the European Communities and, in doing so, became involved in the construction of a new political and legal community’ (*Introduction*, xvi) and, second, that, in fact, ‘[t]he Court’s *greatest success* may have been the role its jurisprudence played in the development of [the] legal epistemic and discursive community’ (*Introduction*, xvii, emphasis added). They also acknowledge both the positive (creation of a ‘space for argumentation and debate’; providing guidance to national courts for future cases; and offering ‘a yardstick from which to assess the Court’s coherent development of the legal order’)

⁵⁰ Lenaerts, n. 17 above, at 297.

⁵¹ Pierre Pescatore, ‘*Van Gend en Loos*, 3 February 1963: A view from within’, 1 at 5.

⁵² Walker, n. 10 above, at 340. Arguably, on one view, reliance on constitutional principles may, at least, have contributed something doctrinally in *Les Verts* itself (the case on which Walker comments) in order to ‘find’ standing for the European Parliament before the Court of Justice where none was (then) granted by the Treaty itself. But Jean-Paul Jacqué undercuts this, with his observation that the decision in *Les Verts* in fact inverts the idea of a Community based on the rule of law since the Court expressly ignored the limits on standing expressly codified in the Treaty (‘Jacqué, n. 42 above, at 318).

⁵³ See e.g. D Edward, ‘*CILFIT* and *Foto-Frost* in their historical and procedural context’, 173.

and negative (vulnerability to charges of judicial activism; self-exposition to contradictions and reversals through ‘not fully anticipating all legal problems’) elements of this mantle.

The involvement of *multiple* actors in the construction of EU constitutional law is an equally strong claim that resonates across several essays, however, – and, crucially, as a result, it is an argument that persists across time. Carlos Closa Montero is adamant that the idea of the Court acting ‘as a single unified actor pursuing an evolutionary and teleological line of reasoning’ needs to be diluted precisely because of the ‘complex interaction between several actors’.⁵⁴ Moreover, Stephen Weatherill prompts the idea of *active* actor-participation, whether self-interested or fortuitous, noting that ‘diverse public and private actors, at national, European and international level, seek to exploit EC law to achieve *their* objectives or to keep it at bay in order to protect *their* privileges.’⁵⁵ This is a direct consequence of the dual impact of *Van Gend en Loos*, since the legal order enhancing application of direct effect also empowers institutions and individuals within that legal order, and this works in two ways. First, there is actor-participation in a *formative* sense. Commenting on *Van Gend en Loos*, for example, Franz Mayer states plainly that the Court followed arguments presented by the Commission legal service.⁵⁶ Morten Rasmussen’s carefully researched historical analysis supports this claim.⁵⁷ In this more formative role than the instrumental contribution already discussed in section 2 above, Christiaan Timmermans unpacks the essential role played by national courts in unleashing the considerable legal potential of the Treaty’s citizenship provisions.⁵⁸ This is amplified in the contribution by Carlos Closa Montero, who also traces the critical role of national courts in highlighting questions of EU citizenship that needed, quite simply, to be answered.⁵⁹ There is also, second, the importance of actor-participation in an *implementation* capacity. Maduro and Azoulai argue that ‘[i]t is the internalisation of the legal solution embodied in a particular judicial decision in the institutional practices of the relevant actors that determines the real success of that legal solution’ (*Introduction*, xvii). We saw earlier that there are contrasting trends in this regard within contemporary EU legal practice (understood in its widest sense also to include courts as well as

⁵⁴ C Closa Montero, *Martínez Sala and Baumbast: An institutionalist analysis*, 394 at 394.

⁵⁵ S Weatherill, ‘*Bosman* changed everything: The rise of EC sports law’, 480 at 487 (emphasis added).

⁵⁶ Mayer, n. 7 above, at 18 and 20. Nicolaïdis makes a similar point in the context of *Cassis*: ‘as the story goes, the Commission fished around for a case of this sort and worked closely with the plaintiffs to bring it forward’ (n. 4 above, at 449).

⁵⁷ Rasmussen, n. 46 above.

⁵⁸ C Timmermans, ‘*Martínez Sala and Baumbast revisited*’, 345 at 345; J Shaw, ‘A view of the citizenship classics: *Martínez Sala* and subsequent cases on citizenship of the Union’, 356 at 349.

⁵⁹ Closa Montero, n. 54 above, at 396–398.

lawyers). In the constitutionally formative phase at least, Rasmussen argues that an actively participating 'transnational network of jurists' sharing 'a common federalist ideology' played a valuable role alongside the Commission in this regard.⁶⁰

Having rationalised the Court of Justice's decision in *Les Verts* in the argument that strengthening judicial protection trumps political disagreement, Koen Lenaerts drew some comfort from the subsequent benediction of the Court's choices through express Treaty recognition (in this matter, via the Maastricht Treaty).⁶¹ Is this enough? Is it the same as a judgment not being reversed? Fennelly notes that '[t]he Treaties did not provide for direct effect, still less for supremacy. They established the Court of Justice, which filled the gap'.⁶² Does the *repeated* practice of Treaty codification for judicially birthed principles provide the necessary degree of legitimacy for the frequently original character of the Court's creativity? The express legal status granted to the Charter is another of several acknowledged examples of 'express constitutionalisation', if we apply, in the first instance, the modest definition of Treaty incorporation to that process. The enhanced rationalisation provided by the provisions on EU citizenship for certain developments in personal free movement law is another.⁶³ The Treaty can be changed in the other direction too, however; for example, Damien Chalmers criticises the Lisbon Treaty amendment of Article 6(1) TEU, which wipes out the Amsterdam-inserted statement that the EU is 'founded on' respect for fundamental rights, as a 'retrenchment', suggesting that this signals that fundamental rights considerations are now to be 'a second-order quality which conditions all the work of the European Union' (although he also characterises this as 'an acknowledgement of the cold reality' and the manifestation of a 'practical morality'.⁶⁴ Takis Tridimas traces the (growing) references to the Charter in the case law of both the General Court and the Court of Justice, but he observes that, surprisingly, 'in none of the cases has a reference to the Charter been material to the Court's reasoning'.⁶⁵ Supporting this thesis, it is somewhat curious to realise that the Court of Justice did not mention the Charter at all in *Metock*, for example, a decision that seems profoundly engaged with the realisation of fundamental rights

⁶⁰ Rasmussen, n. 46 above, at 69. See similarly, De Witte, n. 8 above, at 9. But cf. Eleanor Sharpston's discussion of the *negative* reactions that also greeted classic Court of Justice judgments ('The shock troops arrive: Horizontal direct effect of a Treaty provision and temporal limitation of judgments join the armoury of EC law', 251).

⁶¹ Lenaerts, n. 17 above, at 297.

⁶² Fennelly, n. 4 above, at 39.

⁶³ See e.g. Timmermans, n. 58 above, at 357.

⁶⁴ Chalmers, n. 34 above, at 149.

⁶⁵ Tridimas, n. 28 above, at 102.

(respect for family life in that case); and yet it draws expressly from the Charter in *Laval*, in which its understanding and application of the right to collective bargaining were sharply criticised.⁶⁶ Chalmers offers a persuasive critique that, incremental jurisprudence on fundamental rights aside, the EU operates under and within ‘the absence of a fundamental rights ethic’, a condition which is ‘particularly apparent when the Court of Justice is faced with ruling on sensitive matters that are strongly informed by powerful national or constitutional traditions’.⁶⁷ It is difficult to dismiss the suspicion that the Court will carry on regardless, however; drawing expressly from Treaty and/or Charter provisions when these are helpful, but not being confined by Treaty parameters either. Treaty codification of Court practice might bring some comfort after the fact to public and political discourse, but it does not necessarily impact either way on the Court itself.

This leads us neatly to an even more difficult question: what if we pursue a more complex understanding of express constitutionalisation than post facto Treaty recognition? Can we still, under that lens, absorb and accept ‘the judicialisation of decision-making processes where representative institutions used to have the exclusive word’?⁶⁸ Hofmann points, in the context of mutual recognition, to the even more acute impact of ‘horizontal integration’, in the sense that the judgment in *Cassis de Dijon* created a new dimension to *Costa* primacy through a ‘trans-territorial effect of the law on one Member State in another Member State.’⁶⁹ Nicolaïdis develops this idea, noting that ‘[u]nder mutual recognition, [citizens] must live with regulations adopted in other polities, in which they have no say. In democratic terms such horizontal transfer of sovereignty is a much more radical option than a vertical one.’⁷⁰ Recalling the inherent tensions in the practice of constitutional pluralism, she adds that this horizontal process ‘is highly conflictual and will not happen without serious resistance’. In the specific context of proportionality review, for example, Mattias Kumm reminds us that the Court engages in systematic policy evaluations (and, through its usually directive judgments, policy making) through its application of the proportionality principle, about which ‘there is nothing specifically law-like’.⁷¹ He further asserts that ‘courts engaged in this type of rights reasoning are no longer

⁶⁶ Case C-127/08 *Metock and others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.

⁶⁷ Chalmers, n. 34 above, at 142.

⁶⁸ Shaw, n. 58 above, at 364.

⁶⁹ Hofmann, n. 24 above, at 66.

⁷⁰ Nicolaïdis, n. 4 above, at 450.

⁷¹ Kumm, n. 15 above, at 110.

enforcers of a political will that has previously created and defined a set of legal rights'. Even more cuttingly, he claims that '[s]uch a court has transformed itself into a veto-holding junior-partner in the joint legal-political enterprise of developing and enforcing rational policies'. Arguably, this charge sticks even more powerfully to a court that behaves as such in the enterprise of constitution-building. These points will be picked up again in section 4 below.

As a final point, it is perhaps worth noting that whatever might be said about divining the motivations of the original Court of Justice, with just seven judges discussing every case, it is impossible to conceive of something that can still be described as 'the Court' with 27 judges working in variable chamber formations. Maduro and Azoulai themselves stress that we can 'not ignore the impact this may have in the deliberative process of the Court'; moreover, 'the relative weight of institutional memory decreases and collegiality tends also to be reduced ... The Court will have to make an important effort to balance the quantity and quality of its judicial output' (*Introduction*, xix).

4. The Future of EU Law

There is a notable theme of disappointed expectations in contributions (or sections within contributions) addressing the evolution of substantive policy areas through case law,⁷² suggesting that there is still a lot of substantive legal work to do. The editors themselves predict growth in litigation grounded in, first, review against fundamental rights principles and, second, thinking of the explicit taxonomy of exclusive, shared and complementary competences delimited through the Lisbon Treaty, challenges oriented to controlling how and when the Union exercises its competences (*Introduction*, xix). Although Baquero Cruz drew an accurate picture of the EU legal system existing in an unhelpful mood of perpetual crisis, the day to day work of the EU and thus of the Court will nevertheless continue.

⁷² This is especially noticeable in the essays on *Defrenne* and the evolution of equality law in relative isolation from social policy (see especially, S O'Leary, '*Defrenne II* revisited', 274, and H Muir Watt, 'Gender equality and social policy after *Defrenne*', 286); but see, conversely, the legitimacy concerns raised by Menéndez about the Court's invasion of State-centred 'distributive and solidaristic' welfare regimes through the route of EU citizenship (AJ Menéndez, 'European citizenship after *Martínez Sala* and *Baumbast*: Has European law become more human but less social?', 363 at 390). The 'disappointed expectations' feeling also emerges from the contributions by Bernard and Nicolaïdis on the free movement of goods, on the unfulfilled potential of mutual recognition; and, observing that the mechanism has never been incorporated into the Treaty framework, from the discussion of state liability by Baquero Cruz.

But what is the fate of EU constitutional uncertainty? Relating his discussion to more detailed explanatory narratives of constitutionalism (that were admittedly glossed over here, in section 2 above), Walker locates the Court's contribution to that discourse in the narrative of *sui generis* constitutionalism: 'a narrative of constitutional self-understanding focused upon incrementalism and the patient building of the legal and institutional infrastructure of the polity, but with little reference to its authoritative and social registers'.⁷³ Walker asserts that EU constitutionalism 'was unlikely ever to succeed in these narrow terms', and so, this is where the past and future of EU law must engage with the past and future of the EU more generally to meet the challenge of polity endurance. Linking the Court-centred constitutional project with the 'rituals of state constitutionalism' through the overtly civic constitutional debate of the past decade that fed into the ultimately flawed constitutional settlement of the Lisbon Treaty, he describes how 'the incremental constitutional story ran into other and, for some, more resonant constitutional stories based upon state-coded fears or hopes about European integration'.⁷⁴ This suggests that there is a point at which, so far at least, the potential offered by *sui generis* constitutionalism simply runs out. Walker argues, first noting that, in the Lisbon Treaty, 'explicitly constitutional language is once again eschewed', that:

the constitutional future of the EU is not fated to be the modest affair intimated by the Court or indeed correspond to *any* predetermined template, but is an open question that can only be resolved, if at all, through the constitutional (or some functionally equivalent) process itself. The irony of the Court's modest contribution to constitutional modesty, then, is acute. Without the incremental understanding of polity development to which it contributed, an explicit political discourse and process of constitutionalism may not have emerged at all. But that truncated polity vision, in tending to close itself off from the thicker and more politically contentious questions of Europe's polity identity that a fully fledged constitutional debate inevitably raised, may also have contributed to the subsequent inability to find the minimal common terms which would allow such a debate to proceed in a fruitful manner.⁷⁵

Michael Dougan has captured this astutely elsewhere, with the charge that the Lisbon Treaty wins minds, not hearts.⁷⁶ And that is not how we tend to appreciate the value of constitutions.

Thinking about the Lisbon Treaty a bit further, however, focusing on what it did do more than what it did not, shows also that the 'Court's modest contribution to constitutional modesty'

⁷³ Walker, n. 10 above, at 341.

⁷⁴ *Ibid.* at 341.

⁷⁵ *Ibid.* at 342.

⁷⁶ M. Dougan, 'The Treaty of Lisbon 2007: Winning minds, not hearts', (2008) 45:3 *CMLRev* 609.

has left a powerful and indelible imprint. Explicit constitutional language is avoided, yes; yet the message is preserved in the knots-tying Declaration on primacy. Individual standing for judicial review actions before the Court of Justice, one of the longest standing thorns in the complete system of EU judicial protection, is quietly extended.⁷⁷ Sensitive political decision-making within former Title IV EC will be opened up to the preliminary reference procedure. And the vast bulk of substantive Treaty provisions, where the Court has done the most damage/made the most progress, are almost untouched. The Lisbon Treaty is not just about the failure of a more sophisticated constitutional vision then, but about the clear entrenchment – through political *and* popular endorsement – of the Court's thinner version. Since we are unlikely to see a fundamental Treaty revision debate for some time to come, this arguably signals that we have to recalibrate the idea of the constitutional uncertainty of EU law and accept instead, for some time yet, that constitutionally 'less' is nonetheless constitutionally enough. That that much *is* now certain. But it might not prove to be enough, because even the most densely constructed structure will fall down without proper foundations. Perhaps the message we can take forwards from *The Past and Future of EU Law* is that the classics of EU law *have* been comprehensively and thoroughly assessed, and it is the project's emphasis on how we resolve (or learn to accept how we have resolved) many of the difficult questions that case law has raised that must engage us now. Because the future, constitutional and substantive, of EU law continues to unfold before us in real time.

⁷⁷ See Article 263(4) TFEU.